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February 16, 2016

Mark J. Langer, Clerk
United States Court of Appeals
for the District of Columbia Circuit
United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866

RE: *Sands v. NLRB*, No. 14-1185 (oral argument set for February 18, 2016)

Dear Mr. Langer:

On behalf of Petitioner Laura Sands I am responding to the Board's February 12, 2016 FRAP 28(j) submission.

The Board misrepresents how the mootness question arose in this appeal. The Board pretends that mootness was raised *sua sponte* by the Intervening Union. In fact, it was Sands who *preemptively* devoted five pages of her brief to the issue of mootness—laying out precisely why a live controversy with redressible injuries remains, despite the Union's unilateral, midnight machinations to moot the case. Sands Br. 6-11. The Board's brief was silent on the mootness question despite Sands raising it.

The Board now abuses FRAP 28(j) to cite two old cases supporting a proposition it never previously briefed. *Williams v. Romarm, SA*, 756 F.3d 777, 787 (D.C. Cir. 2014) (“[T]he 28(j) process should not be employed as a second opportunity to brief an issue not raised in the initial briefs . . .”).

Gally v. NLRB, No. 11-2262 (2d Cir. Sept. 10, 2012) (2012 WL 4902832) and *Orce v. NLRB*, No. 97-4038 (2d Cir. Dec. 9, 1997) (1997 WL 829268) are readily distinguishable. In neither case did the petitioner seek a notice posting remedy. Moreover, both cases conflict with decisions of this and other circuits. *See, e.g., Montague v. NLRB*, 698 F.3d 307, 313 (6th Cir. 2012) (case not moot because of the availability of a notice posting remedy, even though the facility was no longer covered by a contractual

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agreement or owned by the employer); *see also J. Picini Flooring*, 356 NLRB No. 9 (2010) (NLRB's standard remedy includes internet and electronic posting of notices).

Campbell-Ewald Co. v. Gomez, 136 S.Ct. 663, 670 (Jan. 20, 2016), held that an unaccepted settlement offer does not moot a case. Here, Sands never cashed the Union's unsolicited check, and she continues to seek a notice posting remedy. She has, in effect, rejected the Union's settlement offer.

The Board cites *In re Idaho Conservation League*, No. 14-1149 (D.C. Cir. Jan. 29, 2016) (2016 WL 363297), but that case does not concern traditional Board remedies and is therefore irrelevant.

Respectfully,

/s/ Aaron B. Solem

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ABS/njr

cc: All counsel via ECF